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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CAROLE KOLSTAD,

Petitioner,

v.

AMERICAN DENTAL ASSOCIATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

In what circumstances may punitive damages be awarded under Title VII of the 1964 Civil Rights Act, as amended, for unlawful intentional discrimination?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

SUMMARY OF ARGUMENT 12

ARGUMENT 14

I. PUNITIVE DAMAGES ARE AUTHORIZED UNDER SECTION 1981A(B)(1) WHERE THE DEFENDANT KNEW OR SHOULD REASONABLY HAVE KNOWN THAT ITS CONDUCT WAS PROBABLY UNLAWFUL . . . 14

A. *The Ordinary Meaning of the Phrase "Reckless Indifference to the Federally Protected Rights of an Aggrieved Individual" Requires This Interpretation* 15

B. *The Ordinary Meaning of the Phrase "Reckless Indifference" is Consistent with the Structure of Section 1981a* 27

C. *The Ordinary Meaning of the Phrase "Reckless Indifference" is Consistent with the Legislative History of Section 1981a* 36

Page

II. PUNITIVE DAMAGES ARE AUTHORIZED UNDER SECTION 1981A(B)(1) WHERE THE DEFENDANT INTENDED TO VIOLATE FEDERAL LAW OR ACTED WITH ILL WILL OR INTENT TO CAUSE INJURY 45

CONCLUSION 48

APPENDICES:

APPENDIX A: STATUTORY PROVISIONS A-1

Section 102 of the Civil Rights Act of 1991 (42 U.S.C. § 1981a) A-1

Section 3(2) of the Americans With Disabilities Act of 1990 (42 U.S.C. § 12102(2)) A-5

Section 101(8)-(9) of the Americans With Disabilities Act of 1990 (42 U.S.C. § 12111(8)-(9)) A-5

Section 102 of the Americans With Disabilities Act of 1990 (42 U.S.C. § 12112) A-6

Section 104 of the Americans With Disabilities Act of 1990 (42 U.S.C. § 12113(a)-(b)) A-12

APPENDIX B: FEDERAL STATUTES USING THE TERM "RECKLESS" A-13

APPENDIX C: FEDERAL STATUTES USING THE TERM "INDIFFERENCE" A-20

TABLE OF AUTHORITIES

Page(s)

CASES:

American Dental Ass'n v. Kolstad, __ U.S. __ (No. 98-364, Nov. 2, 1998) 2

Anderson v. City of Bessemer City, 470 U.S. 564 (1985) 46

Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986) 33

Beauford v. Sisters of Mercy-Province of Detroit, Inc., 816 F.2d 1104 (6th Cir. 1987), *cert. denied*, 484 U.S. 913 (1987) 37, 40

Berry v. Stevinson Chevrolet, 74 F.3d 980 (10th Cir. 1996) 34

Burlington Indus. Inc. v. Ellerth, 118 S. Ct. 2257 (1998) 46, 47

Chandler v. Roudebush, 425 U.S. 840 (1976) 15

Collins v. State of Illinois, 830 F.2d 692 (7th Cir. 1987) 34

County of Sacramento v. Lewis, 118 S. Ct. 1708 (1998) 22

Dreyer v. ARCO Chemical Co., 801 F.2d 651 (3d Cir. 1986), *cert. denied*, 480 U.S. 906 (1987) 29

Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469 (1992) 36, 37

Estelle v. Gamble, 429 U.S. 97 (1976) 23

Farmer v. Brennan, 511 U.S. 825 (1994) 23

Table of Authorities (continued)

Page(s)

Furman v. Georgia, 408 U.S. 238 (1972) 21

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 18

Hansard v. Pepsi-Cola Metro. Bottling Co., 865 F.2d 1461 (5th Cir.), *cert. denied*, 493 U.S. 842 (1989) 29

Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) . *passim*

Herbert v. Lando, 441 U.S. 153 (1979) 14, 22, 23

Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975) . . 31

International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991) 31, 32

Johnson v. Mayor and City Council of Baltimore, 472 U.S. 353 (1985) 31

Johnson v. Transportation Agency, 480 U.S. 616 (1987) 33

Kaiser Aluminum v. Bonjorno, 494 U.S. 827 (1990) . . . 36

Kawaauhau v. Geiger, 118 S. Ct. 974 (1998) 23

Kim v. Nash Finch Co., 123 F.3d 1046 (8th Cir. 1997) 39, 40

Landgraf v. USI Film Products, 511 U.S. 244 (1994) . 44, 45

Lockhart v. Westinghouse Credit Corp., 879 F.2d 43 (3d Cir. 1989) 29

Luciano v. Olsten Corp., 110 F.3d 210 (2d Cir. 1997) . 45

Table of Authorities (continued)

Page(s)

Mattern v. Eastman Kodak Co., 104 F.3d 702 (5th Cir.), *cert. denied*, 118 S. Ct. 336 (1997) 34

McLaughlin v. Richland Shoe Co., 486 U.S. 128 (1988) 19, 20

Merriweather v. Family Dollar Stores of Ind., Inc., 103 F.3d 576 (7th Cir. 1996) 40

Milwaukee & St. Paul R. Co. v. Arms, 91 U.S. 489 (1876) 18, 42

Moreno v. Consolidated Rail Corp., 63 F.3d 1404 (6th Cir. 1995), *vacated on other grounds*, 99 F.3d 782 (6th Cir. 1996) 40

Moskal v. United States, 498 U.S. 103 (1990) 15

New York Times v. Sullivan, 376 U.S. 254 (1964) 22

Pacourek v. Inland Steel Co., 858 F. Supp. 1393 (N.D. Ill. 1994) 33

Patterson v. P.H.P. Healthcare Corp., 90 F.3d 927 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 767 (1997) 40

Paxton v. Union National Bank, 688 F.2d 552 (8th Cir. 1982) 34

Philadelphia, W. & B. R. Co, v. Quigley, 62 U.S. 202 (1859) 42

Resnick v. American Dental Ass'n, 90 F.R.D. 530 (N.D. Ill. 1981) 11

Table of Authorities (continued)

Page(s)

Rowlett v. Anheuser-Busch Inc., 832 F.2d 194 (1st Cir. 1987) 37, 39, 42-43

Russo v. Trifari, Krussman & Fishel, Inc., 837 F.2d 40 (2d Cir. 1988) 20

Saba v. Campagnie Nationale Air France, 78 F.3d 664 (D.C. Cir. 1996) 16

School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987) 36

Shager v. Upjohn Co., 913 F.2d 398 (7th Cir. 1990) . . 46

Smith v. Wade, 461 U.S. 30 (1983) . . . . . *passim*

Stallworth v. Shuler, 777 F.2d 1431 (11th Cir. 1985) 38, 39

Tison v. Arizona, 481 U.S. 137 (1987) 20, 21

Trans World Airlines, Inc. v. Thurston, 69 U.S. 111 (1985) . . . . . *passim*

Turic v. Holland Hospitality Inc., 849 F. Supp. 544 (W.D. Mich. 1994), *aff'd in part, rev'd in part*, 85 F.3d 1211 (6th Cir. 1996) 33

United States v. Krizek, 111 F.3d 934 (D.C. Cir. 1997) 16

United Steelworkers of America v. Weber, 443 U.S. 193 (1979) 33

Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976) 31

Table of Authorities (continued)

Page(s)

Wallace v. Pyro Mining Co., 1991 U.S. App. LEXIS 30157 (6th Cir. 1991) 33

Western Air Lines v. Criswell, 472 U.S. 400 (1985) . . . 31

Wilson v. Seiter, 501 U.S. 294 (1991) 23

STATUTES:

Age Discrimination in Employment Act ("ADEA") (29 U.S.C. §§ 621, *et seq.*) . . . . . *passim*
- 29 U.S.C. § 623(f)(1) 31
- 29 U.S.C. § 623(h) 32
- 29 U.S.C. § 630(b) 32
- 29 U.S.C. § 630(f) 32, 33
- Act of Oct. 31, 1986, Pub. L. No. 99-592, 100 Stat. 3342 31

Americans with Disabilities Act of 1990 ("ADA") (42 U.S.C. §§ 12101, *et seq.*)
- 42 U.S.C. § 12102(2) 35
- 42 U.S.C. § 12111(8) 35
- 42 U.S.C. § 12112 34
- 42 U.S.C. § 12113(b) 35

Civil Rights Act of 1964 (42 U.S.C. §§ 2000e, *et seq.*)
- 42 U.S.C. § 2000e(b) 32
- 42 U.S.C. § 2000e(b)(1) 32
- 42 U.S.C. § 2000e(b)(2) 32
- 42 U.S.C. § 2000e(f) 32, 33
- 42 U.S.C. § 2000e-1 32
- 42 U.S.C. § 2000e-1(a) 33
- 42 U.S.C. § 2000e-1(e)(2) 31
- 42 U.S.C. § 2000e-2(e) 33

Table of Authorities (continued)

Page(s)

- 42 U.S.C. § 2000e-2(f) 32
- 42 U.S.C. § 2000e-2(i) 32
- 42 U.S.C. § 2000e-3(a) 34

Civil Rights Act of 1991 (42 U.S.C. §§ 1981 Notes, 1981a)
- 42 U.S.C. § 1981a(a)(2) 34
- 42 U.S.C. § 1981a(b)(1) . . . . . *passim*

Pregnancy Discrimination Act of 1978 (42 U.S.C. § 2000e(k) 33

Other United States Statutes
- 11 U.S.C. § 363(n) 25
- 12 U.S.C. § 3417(a)(3) 26
- 15 U.S.C. § 78u(h)(7)(A)(iii) 26
- 15 U.S.C. § 1116(d)(10)(B)(11) 26
- 15 U.S.C. § 1679g(b) 26
- 15 U.S.C. § 1681n(a)(2) 26
- 15 U.S.C. § 1691e(b) 26
- 18 U.S.C. § 2707(c) 26
- 18 U.S.C. § 2710(c)(B) 26
- 18 U.S.C. § 2724(b)(2) 25, 26
- 18 U.S.C. § 3591(a)(2)(D) 21
- 26 U.S.C. § 7431(c)(1)(B)(ii) 25, 26
- 28 U.S.C. § 1254(1) 2
- 42 U.S.C. § 300aa-23(d)(2)(a) 26
- 42 U.S.C. § 669a(c)(3)(A) 25
- 42 U.S.C. § 1981 . . . . . 37, 38
- 42 U.S.C. § 1983 . . . . . *passim*
- 42 U.S.C. § 14503 . . . . . 37, 38

Del. Code Ann., Tit. 11, §§ 636(a)(2), 636(6)(1979) . . 21

Table of Authorities (continued)

Page(s)

REGULATIONS:

29 C.F.R. § 1630.2(i)-(l) 35

29 C.F.R. § 1630.2(m) 35

OTHER AUTHORITIES:

Black's Law Dictionary (6th ed. 1990) 14, 17

137 Cong. Rec. 15,473 (Oct. 30, 1991) 45

H.R. Rep. No. 102-40(I), 102d Cong., 1st Sess. . 37, 38, 44

H.R. Rep. No. 102-40(II), 102d Cong., 1st Sess. 38

Restatement (Second) of Torts
§ 500 . . . . . 14, 25
§ 908(2) 13, 24, 25, 42

W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts*, (5th ed. 1984) 14

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Webster's College Dictionary (1991) 17

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BRIEF FOR PETITIONER

OPINIONS BELOW

The en banc opinions of the United States Court of Appeals for the District of Columbia Circuit are reported at 139 F.3d 958 (D.C. Cir. 1998) and are reprinted in the appendix to the petition for a writ of certiorari ("Pet. App.") at pages 1a-41a. The Court of Appeals' orders denying rehearing and granting rehearing en banc are reprinted at Pet. App. 75a-77a. The original panel decision in the Court of Appeals, which is reported at 108 F.3d 1431 (D.C. Cir. 1997), is set out at pp. 42a-68a of the Petition Appendix. The memorandum opinion and order of the United States District Court for the District of Columbia, which is reported at 912 F.Supp. 13 (D.D.C. 1996), is set out at pp. 69a-74a of the Petition Appendix. The October 26, 1992 judgment, that had been entered on the verdict, is reprinted in the joint appendix ("J.A.") at page 111.

JURISDICTION

The Court of Appeals issued its en banc opinions on May 8, 1998. Pet. App. 1a. Petitioner filed her petition for writ of certiorari on July 31, 1998. This Court granted certiorari on November 2, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set out in the Appendix A to this brief.

STATEMENT OF THE CASE

Petitioner commenced this action in 1994 in the United States District Court for the District of Columbia, alleging that she had been denied a promotion because of her sex in violation of Title VII of the 1964 Civil Rights Act. The complaint sought back pay, injunctive relief and punitive damages.

The case was tried to a jury, which found that petitioner had indeed been the victim of intentional discrimination on the basis of sex. (J.A. 109-10). The district court denied respondent's post-trial motion for judgment as a matter of law on the merits of petitioner's discrimination claim. (Pet. App. 69a-74a). The court of appeals panel which first heard this case unanimously upheld the jury's finding of intentional discrimination.[1] (Pet. App. 46a-49a). The court of appeals declined to grant rehearing en banc with regard to the liability determination. This Court denied a cross-petition seeking review of this aspect of the case. *American Dental Ass'n v. Kolstad*, __ U.S. __ (No. 98-364, Nov. 2, 1998).

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[1] The panel decision overturned the district court's decision denying injunctive relief and counsel fees, and remanded for further consideration of those issues. (Pet. App. 54a-56a).

The issue which was addressed by the court of appeals en banc, and which is the subject of the question presented, is petitioner's claim for punitive damages. The district court refused to instruct the jury on punitive damages. (J.A. 104-109). A divided panel of the court of appeals held that the district court had erred in dismissing petitioner's punitive damage claim. (Pet. App. 42a-68a). The court of appeals granted rehearing en banc limited to this issue. (Pet. App. 75a-76a). A narrowly divided en banc court sustained the rejection of petitioner's punitive damage claim. (Pet. App. 1a-41a).

STATEMENT OF FACTS

Respondent is a Chicago-based professional organization which maintains an office in Washington, D.C. to represent its members' interests before Congress and various federal agencies. In September 1992, Jack O'Donnell, the second-highest ranking employee in ADA's Washington office, announced his retirement at year's end. O'Donnell held the dual-titled position of Director of Legislation and Legislative Policy and Director of the Council on Government Affairs and Federal Dental Services. In the fall of 1992 petitioner was working in respondent's Washington office as its Director of Federal Agency Relations, a position that she had held for four years. (Pet. App. 38a). Petitioner ultimately applied for O'Donnell's position, but was rejected in favor of a male candidate, Tom Spangler, who had worked for respondent for less than two years. (Pet. App. 43a-44a).

The jury found that petitioner was denied the promotion in question because she was a woman; the correctness of the jury's special verdict finding of intentional discrimination is no longer subject to dispute. The evidence adduced in support of that verdict, however, remains important to the question of whether petitioner was entitled to have the jury consider her request for punitive damages.

Shortly after O'Donnell announced his intended retirement, petitioner began a series of efforts to confer with the Director of the Washington office, Leonard Wheat, to discuss her interest in O'Donnell's position. Wheat, however, repeatedly refused to meet with her. (Pet. App. 44a, 48a). Although Wheat finally met with petitioner on October 30, 1992, to discuss her interest in the promotion, he failed to pass on her interest in succeeding O'Donnell to respondent's Executive Director, Dr. William Allen, and he only belatedly informed petitioner that he had failed to do so.[2]

The written job announcement for O'Donnell's position expressly required ten years of experience in legislative advocacy or governmental affairs work.[3] Kolstad's legislative work at the Pentagon and her regulatory duties at the ADA plainly satisfied this 10-year requirement; indeed, the "ADA

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[2] Kolstad's written memorandum to Allen (J.A. 52-53) detailed Wheat's persistent rejection of Kolstad's requests to meet with him to discuss the O'Donnell vacancy and Wheat's studied refusal to inform Allen of Kolstad's interest in the position. Kolstad informed Allen that "yesterday when I inquired [of Wheat concerning my request to meet with you on November 16 or 17,] he said that he did *not* discuss this with you here this week and that he would call you yesterday about this. Today he told me that you did not have the time to discuss this when he spoke with you yesterday on the phone." (J.A. 52).

[3] The precise language contained in the vacancy announcement was as follows:

> "JD or LLB degree and at least 10 years experience in legislative advocacy/governmental affairs including a minimum of 3 years related experience with the Federal government, preferably as a Congressional staff member, or with an association or as a legal/legislative representative for a political party; solid knowledge of the Federal system and legislative/regulatory process; strong oral/written communications skills."

J.A. 54-55).

concede[d] that Kolstad 'met the paper qualifications for the vacancy.'" (Pet. App. 47a). By contrast, the court of appeals found, as Wheat and Allen had admitted, that Spangler "technically failed to meet the minimum posted requirements for the position." (Pet. App. 38a; October 20, 1995 Tr. at 70-71; October 23, 1995 Tr. at 156).[4] Despite this problem, Wheat recommended that Spangler be given the promotion and Allen accepted his recommendation.

Although the final selection of Spangler was made by Allen, Wheat played a critical role in the process — not only his efforts to deflect petitioner's pursuit of the job — but also in the actual decision to select Spangler.[5] Under respondent's procedures, Wheat was responsible for filing O'Donnell's job; Wheat, however, asked Allen to make the ultimate decision, albeit in the light of Wheat's recommendation. Wheat, of course, recommended the selection of Spangler. "Allen . . . relied heavily upon Wheat's recommendation of Spangler." (Pet. App. 38a).

Wheat's role was important because there was substantial direct evidence of discriminatory motive on his part.[6]

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[4] Spangler had been a lobbyist for six and one half years. His only other professional experience was as a labor negotiator and consultant, neither of which involved legislative advocacy or governmental affairs. (J.A. 79-80).

[5] Wheat was the acting director of the ADA's Washington office and, thus, O'Donnell's supervisor. He was involved in Allen's revisions of the job description (October 20, 1995 Tr. at 48-49), and the conduit through whom that new description was made available for Kolstad's review. (J.A. 61). Wheat was responsible for interviewing both candidates and claimed that he made a formal recommendation to Allen. (J.A. 84-86, 87-89).

[6] There was also indirect evidence that the ADA maintained, at least in its Washington office, a gender-stratified workforce. Census

Although Wheat was regularly available to work with male employees in the office, he had on numerous occasions refused to meet with petitioner, interfering with her ability to do her work. Oct. 18, 1995 Tr. at 114-15. Wheat also denied petitioner a number of career enhancing opportunities. (Pet. App. 48a-49a). No less tellingly, on a series of occasions Wheat used the epithet "bitch" to refer to professionally prominent women with whom the Washington office worked. (Pet. App. 4a, 22a, 49a). Wheat also regaled his subordinates with off-color jokes about the female anatomy. When petitioner expressly objected to these remarks, Wheat desisted from making them when he was alone with petitioner, but continued to make them in meetings where other employees were also present.[7]

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figures concerning the gender of occupants of managerial positions in the ADA confirmed that women were seriously under-represented in the ADA's upper ranks — Salary Grades 11 through 14. As of the date that O'Donnell's vacancy was posted (November 20, 1992), only 7 of 30 jobs in those grades (23.33%) were occupied by women, none in the ADA's Washington office. (J.A. 46-50).

[7] Kolstad described the reasons she complained to Wheat about jokes referring to the female anatomy at staff meetings and in one-on-one discussions she had with him:

> "A. ...I was offended by these jokes. And I went to him in private and said that these were offensive to me. I thought they were demeaning to women. I didn't think it was appropriate to be making those kinds of jokes at a staff meeting with men and women both present. I thought it was sending a very negative message to women. And I asked him to please stop making those kinds of jokes.
>
> Q. And did he stop making those kinds of jokes?
>
> A. Well, he only stopped making them when — those kinds of jokes when it was just me in his office. He continued to make them at staff meetings after that."

(Oct. 18, 1995 Tr. at 123-124).

At the same time that petitioner was experiencing considerable difficulty conveying her interest in the promotion to the ADA's decisionmakers, Spangler was being actively groomed for O'Donnell's position. (Pet. App. 38a). During September, 1992, Spangler met on a daily basis with O'Donnell to learn about O'Donnell's duties. (Pet. App. 48a). In October, 1992, before the O'Donnell vacancy was officially announced, Wheat approved in writing a career plan for Spangler that included the assumption of certain duties that were then part of O'Donnell's job. (Pet. App. 3a, 44a, 48a). The formal notice soliciting applications for the job was finally distributed on November 20, 1992. (J.A. 54-55). On November 23, 1992, when petitioner asked her secretary to type a memorandum expressing an interest in O'Donnell's job, the secretary — who was also O'Donnell's secretary — was surprised by Kolstad's request because it was obvious to the secretary that Spangler had already been chosen to succeed O'Donnell. (Oct. 20, 1995 Tr. at 8-9).[8]

Allen's actions in Chicago were consistent with the pre-selection scheme afoot in Washington. Under respondent's internal procedures the position could not be filled until a written notice was given to current employees describing the vacancy and the job requirements.

> Compiling a description of O'Donnell's position a few days before posting the job, Allen edited the description to fit Spangler's qualifications. O'Donnell's position description originally stated that its "most important responsibility" was to

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[8] The secretary testified that Spangler, who rarely visited with O'Donnell before the latter's retirement-announcement, met extensively with him throughout the fall of 1992, reviewing materials and planning for Council meetings that were scheduled to be held after O'Donnell's departure. (October 20, 1995, Tr. at 10-15).

> "[m]aintain liaison with federal agencies, bureaus and Administration," corresponding directly to Kolstad's work at ADA. Tailoring the job description to Spangler's specialty, Allen added "Congress" before "federal agencies," and also added whole phrases from the position description questionnaire used to hire Spangler.

(Pet. App. 38a-39a). Although only petitioner and Spangler applied for O'Donnell's job, Allen interviewed only Spangler. (Pet. App. 48a). Allen admitted that he had never bothered to review any of the uniformly laudatory evaluations which petitioner had received from her supervisors during her years of employment with respondent. (Pet. App. 48a; J.A. 18-19; 20-21; 26-27; 28-29).

On December 17, 1992, when Allen called petitioner to explain that he had decided to promote Spangler, he gave her two specific reasons for that choice — that Spangler had greater knowledge of health care reform issues, and that petitioner herself was too valuable in her present position to move. (Pet. App. 45a; October 18, 1995 Tr. at 76-77; Oct. 24, 1995 Tr. at 10-11). At trial, however, Allen abandoned these explanations, instead offering two entirely different reasons for the decision. (October 24, 1995 Tr. at 9). The panel opinion below correctly recognized this change as probative evidence of discrimination. (Pet. App. 48a).

The first of the explanations offered at trial was that Spangler was a better writer than petitioner. Allen acknowledged, however, that he had not read the extensive written material that petitioner had produced during her years with respondent. (October 24, 1995 Tr. at 21-22). Petitioner's annual evaluations had been free of any criticism whatever of her writing until the evaluation of November,

1992, *after* O'Donnell announced his retirement.[9] At the time Wheat personally assured petitioner that his comment that he intended to help her with her writing was not serious, but had been included in her evaluation only because higher officials insisted that he make *some* suggestion about how her work might be improved.[10] Spangler, on the other hand, conceded that in the past his own writing had been sharply criticized in annual performance reviews. (Oct. 25, 1995 Tr. at 34). Allen also testified that he had based his choice on the fact that petitioner lacked legislative lobbying experience. (October 24, 1995 Tr. at 9, 19-20). In fact, however, petitioner had "worked for six years as the principal legislative draftsperson for the Department of Defense, preparing testimony for congressional hearings and representing the Department's interests on Capitol Hill." (Pet. App. 37a).

The jury's finding of intentional discrimination necessarily turned to a considerable degree on its evaluation of the credibility of the defense witnesses. In his closing argument, counsel for petitioner attacked the veracity of those

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[9] In fact, Kolstad's supervisors had repeatedly commended her writing, describing her oral and written communication skills as among her "major strengths" as an ADA employee. J.A. 19, 27. Wheat himself wrote that Kolstad's ADA's work reflected a "[t]horough knowledge of [the] federal regulatory process," "ability to identify, *analyze and communicate complex government rules and policies*" and "[d]isciplined work-habits with attention to detail." (J.A. 29) (emphasis added).

[10] Kolstad testified that Wheat "was in a big hurry", he "threw" the performance appraisal on her desk and said, "'Here's your performance appraisal. I have been directed to put down for everyone in the office something that they need to improve, so for you I put down you ought to improve your writing style.'" He said, "'Don't pay any attention to it. Just ignore it. Don't worry about it. It's not [a] big deal.'" (October 19, 1995 Tr. at 26).

witnesses,[11] while counsel for respondent defended their reliability.[12] Allen testified that he had interviewed petitioner for the O'Donnell job, albeit in a very informal manner;[13] petitioner emphatically denied that that had occurred.[14] Allen and Wheat insisted that there had been no scheme to pre-select Spangler for the promotion in question, a practice which they acknowledged would be improper and unfair. (Oct. 23, 1995 Tr. at 16; Oct. 23, 1995 Tr. at 58-59, 136). In the court of appeals, however, respondent conceded that there was sufficient evidence from which the jury could have found that

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[11] "Some of these witnesses couldn't recall when it was convenient not to recall, could shade things when they wanted to shade it, and some of them told absolute whoppers." (Oct. 26, 1995 Tr. at 21).

[12] Oct. 26, 1995 Tr. at 37 ("What possible motivation would he have for saying that, other than the truth?"); *id.* at 39 ("There is no factual basis to suggest that Ms. Sherman was lying when she testified here. There is every reason, by her demeanor and the way she acted, to believe that she was telling the truth"); *id.* at 42 ("How do you describe Dr. Allen? Try these words. Solid, up front, uncomplicated, and truthful"); *id.* at 46 ("Are all of these people that plaintiff identified now lying? How can that be?")

[13] Oct. 23, 1995 Tr. at 147-48.

[14] Kolstad's testimony on this point was unequivocal:

"Q. Were you ever interviewed by Dr. Allen for this position that you expressed an interest in this memorandum?

A. No, I was not.

* * *

Q . . . What I am trying to define here is you can look at an interview as being the narrowest possible thing. Maybe just riding up on an elevator. Did Dr. Allen ever interview you for this job in that kind of an informal setting or any kind of setting?

B. No. He never discussed the position with me at all."

October 18, 1995 Tr. at 127-128.

such pre-selection had, in fact, occurred. (Pet. App. 47a). O'Donnell testified that his daily meetings with Spangler during the fall of 1992 concerned the preparation of health-care reform compilations (Oct. 25, 1995 Tr. at 78); documentary evidence, however, showed that those reports had actually been completed in January 1992. (Oct. 25, 1995 Tr. at 79).[15]

At trial, petitioner also sought unsuccessfully to introduce a 1984 consent decree to which respondent had agreed in settling an earlier Title VII action alleging systematic discrimination against women in filling management positions.[16] Of particular importance was a provision of the

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[15] Allen insisted that before selecting Spangler he had received in his Chicago office and reviewed Applicant Assessment forms prepared by Wheat for both candidates. (October 23, 1995 Tr. at 152). Facsimile transmission records, however, showed that Allen received those reports only *after* he had decided on December 15, 1992 to award the promotion to Spangler. (J.A. 83-89; Oct. 24, 1995 Tr. at 37). And Allen insisted, improbably, that although he used Spangler's job description when he rewrote the job requirements for O'Donnell's position, he did not have Spangler himself in mind at the time. (Oct. 24, 1995, Tr. at 33-34).

[16] In *Resnick v. American Dental Ass'n*, 90 F.R.D. 530, 536-541 (N.D. Ill. 1981), the district court in Chicago, where the ADA maintains its headquarters, certified a nationwide class of women in a suit brought against the ADA under Title VII and the Equal Pay Act. (Pet. App. 39a). In *Resnick*, plaintiffs had alleged that the ADA had engaged in the systemic denial of promotions to women to high-level "supervisory and management positions" which "perpetuates and exacerbates. . .policies and practices of discrimination." 90 F.R.D. at 534 (internal quotation marks omitted). The case was settled through entry and approval of a consent decree which governed personnel administration in the ADA from 1984 through July 1, 1991. J.A. 91-92. Although the ADA had operated for seven years under the *Resnick* decree, which contained provisions designed to increase the number of females in the upper-echelons of the ADA, only one of the six positions at Grade 13 (which included O'Donnell's job) was occupied by a female as of November 20, 1992. (J.A. 46-47).

decree forbidding respondent to continue to engage in pre-selection in filling those jobs.[17] Although the decree itself had expired in the summer of 1991, barely a year before the events giving rise to this lawsuit, petitioner alleged that it showed that respondent was well aware of the impropriety of using pre-selection to assure the promotion of male employees. Complaint, ¶¶ 13, 25. The court of appeals panel concluded that the district court may have erred in excluding this evidence, and directed that it be reconsidered as probative on the issue of punitive damages. (Pet. App. 53a).

SUMMARY OF ARGUMENT

Section 1981a(b)(1) authorizes an award of punitive damages in any case of "reckless indifference" to federally protected rights. This phrase should be given its ordinary, literal meaning. The terms "reckless" and "indifference" clearly refer to an actor's culpable mental state. That is how this Court has utilized those words in a wide variety of contexts involving such disparate topics as the ADEA, the FLSA, libel, substantive due process, capital punishment, and prison conditions. *E.g.*, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985).

The court of appeals erred in expressly disregarding the language of section 1981a(b)(1) on the asserted ground that

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[17] The relevant part of the *Resnick* decree provided that:

> "All persons involved in the process of selecting of candidates will be advised that pre-selection of a favored candidate is contrary to the ADA's firm policy of giving full and fair consideration to each application. Violations of this policy will have an adverse impact on an employee's annual merit review and will be cause for discipline."

(J.A. 16-17).

the term "reckless" is "among the most malleable and ambiguous in the law." (Pet. App. 6a). To the contrary, recklessness is a familiar concept in tort law applied every day by judges and juries.

When Congress has established a statutory standard for the award of punitive damages, it has almost invariably made a defendant's mental state the criterion. That common law tradition is embodied in section 908(2) of the Restatement (Second) of Torts. If Congress had intended to depart from this well-established practice, it surely would not have used the words "reckless indifference" to signal its desire that neither recklessness nor indifference be considered.

The court below insisted that the literal language of section 1981a(b)(1) should be disregarded in order to create a "two-tiered" remedial scheme under the statute. The petitioners in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), advanced the identical argument regarding the ADEA. This Court rejected that contention because the terms of the ADEA, like the terms of Title VII, do not establish as the statutory standard "consisten[cy] with the principle of a two-tiered liability scheme." 507 U.S. at 616.

The legislative history supports a literal reading of section 1981a(b)(1). Both House reports cited the holding in this Court's decision in *Smith v. Wade*, 461 U.S. 30, 56 (1983), which authorizes in section 1983 cases punitive awards for "reckless or callous indifference to the federally protected rights of others." The Court below erred in insisting that what *Smith* actually held was that punitive awards under section 1983 require proof of egregious practices or barbaric abuse. (Pet. App. 11a-12a).

ARGUMENT

I. PUNITIVE DAMAGES ARE AUTHORIZED UNDER SECTION 1981A(B)(1) WHERE THE DEFENDANT KNEW OR SHOULD REASONABLY HAVE KNOWN THAT ITS CONDUCT WAS PROBABLY UNLAWFUL

Section 1981a(b)(1) provides that punitive damages may be awarded for violations of certain provisions of federal law, including Title VII, where the defendant engaged in the discriminatory practice at issue "with reckless indifference to the federally protected rights of an aggrieved individual." The parties offer decidedly different interpretations of this phrase. The court of appeals held, at the urging of respondent, that this phrase requires proof of "egregious conduct" (Pet. App. 2a, 20a-21a) or "truly outrageous acts of discrimination" (Pet. App. 21a n. 9), such as a "pervasive pattern of discriminatory acts." (Pet. App. 13a). Petitioner urges that the phrase "reckless indifference" means exactly what it says--reckless indifference — and that punitive damages are thus authorized where a defendant knew or should reasonably have realized[18] that its conduct was probably[19] unlawful.

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[18] See Restatement (Second) of Torts, § 500 cmt. a (1965).

[19] See *Herbert v. Lando*, 441 U.S. 153, 172 (1979)(libel reckless if speaker was aware that the statement was a "probable falsehood"); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 617 (1993)(reckless indifference present where employer "more likely knows its conduct to be illegal"); Restatement (Second) of Torts, § 500, cmt. a (conduct is reckless if it involves "a high degree of risk"); W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts*, § 34, at 213 (5th ed. 1984)(the usual meaning of reckless is that "the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow"); *Black's Law Dictionary*, p. 1271 (6th ed. 1990)(action reckless if defendant knew or should have known it was "probably or possibly injurious"); 1 L. Schlueter & Kenneth Redden, *Punitive Damages*, pp. 298 (Arkansas model jury instruction; punitive damages warranted where defendant "knew or ought to have known, in the light of the surrounding circumstances, that his conduct would naturally and probably result in (injury)(damage) and . . . he continued such conduct . . . in reckless disregard of the consequences"), 301 (California model jury instruction; punitive damages warranted where defendant "is aware of the probable dangerous consequences of [his][her] conduct and willfully and deliberately fails to avoid those consequences")(3d ed. 1995).

This dispute about the meaning of section 1981a can readily be resolved in light of the plain meaning of the phrase "reckless indifference."

A. *The Ordinary Meaning of the Phrase "Reckless Indifference to the Federally Protected Rights of an Aggrieved Individual" Requires This Interpretation*

(1) This Court has repeatedly insisted that the interpretation of any statute must begin with the actual language to be construed. "'In determining the scope of a statute, we look first to its language,' . . . giving the 'words used' their 'ordinary meaning.'" *Moskal v. United States*, 498 U.S. 103, 108 (1990) (citation omitted). Where the meaning of the statutory text is reasonably clear, that is usually dispositive. "[T]he plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but . . . the ingenuity and study of an acute and powerful intellect would discover." *Chandler v. Roudebush*, 425 U.S. 840, 848 (1976) (citations omitted). If the statutory language is arguably subject to several possible interpretations, the text at least limits the alternative interpretations to be considered.

The en banc court below, however, proceeding in an unorthodox manner, disavowed any reliance on the actual

words of the phrase "reckless indifference." The court admitted that interpreting reckless indifference to refer to a culpable mental state had "some superficial plausibility", but then summarily dismissed that argument — and the actual text of the section 1981a(b)(1) — with three sentences:

> It is a stretch, however, to conclude that, in expressing the standard for punitive damages in § 1981a(b)(1), Congress used terms whose meaning is clear or well settled. We said recently that mental-state standards like "recklessness" and "reckless disregard" are among the most malleable and ambiguous in the law. *See Saba v. Compagnie Nationale Air France*, 78 F. 3d 664, 668-69 (D.C. Cir. 1996); see also *United States v. Krizek*, 111 F. 3d 934, 941 (D.C.Cir. 1997). . . . As we have said, the structure of the statute strongly points to a two-tiered scheme of liability; we decline to read the pliable and imprecise language of § 1981a(b)(1) to flatten that scheme.

(Pet. App. 6a).[20]

Under this approach the words "reckless indifference" played no role whatever in the court of appeals' construction

[20] The decision cited by the court below, *Saba v. Campagnie Nationale Air France*, does not describe the mental state of "recklessness" as among the "most malleable and ambiguous in the law." To the contrary, *Saba* held that recklessness was always present where a defendant acted with deliberate disregard of a known danger, including a danger "so obvious 'the actor must have been aware of it.'" 78 F. 3d at 668-69. The only open question recognized in that case was whether "recklessness" under the Warsaw Convention could be also be based on evidence that a defendant *should* have known of a danger, the ordinary civil law standard, or only on actual knowledge of the danger, as is required in a criminal case. *Id.*

of section 1981a(b)(1). The statutory language neither provided a starting point for interpretation of section 1981a(b)(1) nor imposed any limitations on possible interpretations divined by the court below from other sources. The court of appeals did not hold or even suggest that "reckless" means "egregious", that "indifference" means "conduct," or that "reckless indifference" means "egregious conduct." Under this unusual approach the court proceeded as though the statute authorized punitive damages on showing of "malice or -------", with the courts free to insert in that blank whatever meaning they wished.

(2) The core meaning of "reckless," and thus of "reckless indifference" is neither unclear nor unfamiliar. Both refer to a culpable mental state more blameworthy than mere negligence but less than an actual intent to cause harm or violate the law. One modern dictionary defines "reckless" as "utterly unconcerned about consequences; rash" and "indifference" as a "lack of interest or concern." *Webster's College Dictionary*, 684, 1125 (1991). *Black's Law Dictionary* defines "recklessness" as

> The state of mind accompanying an act, which either pays no regard to its probably or possibly injurious consequences, or which, though foreseeing such consequences, persists in spite of such knowledge. Recklessness is a stronger term than mere or ordinary negligence, and to be reckless; the conduct must be such as to evince disregard of or indifference to consequences . . . .

p. 1271 (6th ed. 1990). Every day state and federal judges and juries familiar with this common meaning apply the standard of recklessness in ordinary tort cases; why judges on the court of appeals in the instant case found the term so

hopelessly ambiguous as to be meaningless is difficult to understand.

In *Smith v. Wade*, 461 U.S. 30 (1983), this Court rejected the contention that "reckless indifference" was "too uncertain a standard" to utilize in determining the appropriateness of punitive damages. 461 U.S. at 49.

> [W]e are not persuaded that a recklessness standard is too vague to be fair or useful. In [*Milwaukee & St. Paul R. Co. v. Arms*, 91 U.S. 489 (1876)], we adopted a recklessness standard rather than a gross negligence standard precisely because recklessness would better serve the need for adequate clarity and fair application.

461 U.S. at 49. The Court stressed that under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974), a showing of "reckless disregard for the truth" was sufficient to authorize an award of punitive damages, despite the exacting standard of clarity and notice imposed by the First Amendment. 461 U.S. at 50.

This Court, not surprisingly, has interpreted or applied the phrase "reckless indifference" and the terms "reckless" and "indifference" in a wide variety of contexts. Those decisions consistently treat that language as referring to a culpable mental state, not to the egregiousness vel non of the conduct in question. Were this Court now to declare these terms unintelligibly malleable and ambiguous, such a holding would wreak havoc in the law.[21]

In *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), this Court held that conduct violative of the ADEA

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[21] We set out in Appendices B and C to this brief federal statutes using the terms "reckless" and "indifference".

was willful, and thus gave rise to liquidated damages, if the defendant had acted with "reckless disregard" for the rights of its employees. 469 U.S. at 126. The Court explained that the "reckless disregard" standard would be met if an employer acted with a "'careless disregard [for] whether or not one has the right so to act,'" and included within that formulation, a "disregard for the governing statute and an indifference to its requirements." 469 U.S. at 127. No such reckless disregard was present in that case because the defendant had consulted with counsel about its legal obligations and, at worst, had "simply overlooked the challenged aspect" of its practices. 469 U.S. at 130. On the other hand, the disputed practices in *Thurston* were undeniably pervasive, affecting the retirement rights of all the airline's pilots, a group numbering more than a thousand. *See* 469 U.S. at 114.

In *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988), the Court applied that same "reckless disregard" standard as the test of whether a violation of the FLSA was willful, where the effect of such willfulness is to extend the statute of limitations under the Act from two years to three. 486 U.S. at 133. Again, the decision made clear that the controlling issue was whether the employer had acted "recklessly . . . in determining its legal obligation", a standard that could not be met in the case of employers "who firmly and reasonably (albeit wrongly) believe that their pay practices are lawful...." 486 U.S. at 134 n. 12, 135 n. 13. Despite the fact that the alleged violation involved the wages paid to more than half a dozen employees "in many work weeks" — presumably a pervasive violation — the Court remanded the case for a determination of whether or not the

required culpable mental state was present. *See* 486 U.S. at 129, 135.[22]

Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993), again applied the *Thurston* "reckless disregard" standard to an ADEA willfulness claim. 507 U.S. at 615. As before, the Court made clear that the test turned on the employer's attitude toward its legal obligations. A finding of recklessness (and thus willfulness) was required if an employer "more likely knows its conduct to be illegal," 507 U.S. at 617, but not if the employer "incorrectly but in good faith and nonrecklessly believes that the statute permits" the actions in question. 507 U.S. at 616. The Court expressly rejected a proposal to require the plaintiff to "demonstrate that the employer's conduct was outrageous," or to "provide direct evidence of the employer's motivation," and indicated that an employer's efforts to hide its motives tended to support a finding of the requisite culpability. 507 U.S. at 617. The Court remanded the case for application of that standard, despite the fact that the action at issue clearly was not pervasive, since the case concerned only the dismissal of a single 62-year old worker. *See* 507 U.S. at 606.

The Court reiterated this understanding of "reckless indifference," and of its distinction from the egregiousness of the underlying conduct, in *Tison v. Arizona*, 481 U.S. 137 (1987). The issue in *Tison* was whether the death penalty could be imposed on a defendant who did not personally

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[22] *McLaughlin* cited a number of lower court decisions as applying the correct rule. 486 U.S. at 131 n. 1. In *Russo v. Trifari, Krussman & Fishel, Inc.*, 837 F.2d 40 (2d Cir. 1988), the court held that an employer's alleged misleading statements to its employees, and the withholding of information from them, could be "thought by a trier of fact to demonstrate not only deliberate age discrimination but also an appreciation of its illegality and a resultant attempt to conceal it." 837 F. 2d at 45.

commit a murder, but who was involved in the criminal scheme which had led to a killing. This Court held that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient" to meet the constitutionally required level of culpability. 481 U.S. at 158. "Reckless indifference," a separate and critical element, concerned "the mental state with which the defendant commits the crime." 481 U.S. at 156.[23] The defendants in *Tison* had a substantial role in the quadruple murder at issue, having participated in the kidnapping which preceded them, witnessed the killings, and aided subsequent escape efforts. Despite the egregiousness of this conduct, the Court insisted that a separate determination was required as to whether the Tisons had in fact acted with reckless indifference. 481 U.S. at 158. The insistence of the court below that "reckless indifference" is so ambiguous as to be virtually meaningless would, if adopted by this Court, have serious consequences in capital punishment litigation. Under such a decision, any state that has applied the *Tison* "reckless indifference" standard to capital cases since 1986 would presumptively be in violation of the requirements of *Furman v. Georgia*, 408 U.S. 238 (1972).[24] Similar problems would be created for any jurisdiction which, like the United States, treats "reckless disregard for human life" as an aggravating factor in a capital case. *See* 18 U.S.C. § 3591(a)(2)(D).

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[23] The opinion in *Tison* did not consider whether the recklessness required by Arizona law or by the Constitution would require subjective knowledge of the risk of harm, as is common in the criminal law context, or could be satisfied by the broader civil law standard of recklessness, which also covers cases in which a defendant should reasonably have realized that risk existed.

[24] *E.g.* Del. Code Ann., Tit. 11, §§ 636(a)(2), 636(6) (1979)(capital punishment authorized where defendant "recklessly" causes death during the commission of a felony).

The distinction between reckless indifference and egregious conduct was of controlling importance in *County of Sacramento v. Lewis*, 118 S. Ct. 1708 (1998), which held that "reckless indifference" to life in a high-speed automobile chase did not violate the Fourteenth Amendment's guarantee of substantive due process.[25] *See* 118 S.Ct. at 1711. Reckless indifference, the Court noted, was a "mid-level fault" between negligence and intentionally causing injury. 118 S. Ct. at 1720. Such indifference was held not to constitute the "egregious official conduct" that could be said to be arbitrary in the constitutional sense. 118 S. Ct. at 1716.

Under *New York Times v. Sullivan*, 376 U.S. 254 (1964), a public figure seeking to maintain a libel action must show that the defendant knew that its statements were false or acted with "reckless disregard" of the truth. In the instant case, the court of appeals cited *New York Times v. Sullivan* as demonstrating the fatal ambiguity of the language of section 1981a(b)(1). (Pet. App. 6a). In fact, however, *New York Times v. Sullivan* and its progeny have given a specific and familiar meaning to the term "reckless." Under *New York Times* a plaintiff must focus on the

> state of mind of the defendant. To be liable, the alleged defamer of public officials or of public figures must know or have reason to suspect that his publication is false. . . . Inevitably, . . . the thoughts and editorial processes of the alleged defamer would be open to examination.

Herbert v. Lando, 441 U.S. 153, 160 (1979). Thus, *Herbert* held that a libel plaintiff is entitled to discover "state-of-mind evidence", 441 U.S. at 161, 163, "through inquiry into the

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[25] The decision refers interchangeably to reckless and deliberate indifference.

thoughts, opinions and conclusions of the publisher." 441 U.S. at 170. *See Kawaauhau v. Geiger*, 118 S. Ct. 974, 977 (1998) (distinguishing "reckless torts" from the more culpable intentional torts.)

For two decades, the decisions of this Court have held that an inmate alleging that prison conditions constitute cruel and unusual punishment must establish that the defendant acted with "deliberate indifference." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). In these cases, "indifference" has uniformly been understood to refer to a particular culpable mental state and to require a deliberate lack of care, as opposed to merely "an inadvertent failure." 429 U.S. at 105.

> While *Estelle* establishes that deliberate indifference entails something more than mere negligence, the cases are also clear that it is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result.

Farmer v. Brennan, 511 U.S. 825, 835 (1994). In *Farmer*, this Court noted with approval that

> the Courts of Appeals have routinely equated deliberate indifference with recklessness. . . . It is, indeed, fair to say that acting or failing to act with deliberate indifference of a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk.

511 U.S. at 836 (footnote omitted)(citations omitted). *Wilson v. Seiter*, 501 U.S. 294 (1991), reiterated that "deliberate indifference" delineates the "culpable state of mind on the part of prison officials" required to establish a violation of the Eighth Amendment. 501 U.S. at 296; *see id.* at 297, 298.

(3) A literal reading of the phrase "reckless indifference" would be consistent with the standards generally utilized under federal law to determine the availability of punitive damages.

In *Smith v. Wade*, 461 U.S. 30 (1983), this Court set out the standard for awards of punitive damages in civil rights actions under section 1983. All members of the Court agreed that the appropriate standard was a culpable mental state on the part of the defendant, and that that standard included both intentional violations of known legal rights and violations occasioned by ill will or an intent to harm.[26] The majority held that punitive damages could also be awarded where a plaintiff demonstrated that the defendant was guilty of "reckless or callous indifference to the federally protected rights of others." 461 U.S. at 56. This phrase, which Congress in 1991 incorporated with little change into section 1981a(b)(1), was understood by every member of the Court in *Wade* to refer to the defendant's state of mind. *See* 461 U.S. at 42-43 ("that entire want of care which would raise the presumption of a conscious indifference to consequences")(majority opinion), *id.* at 61-62 (dissenting opinion of Justice Rehnquist) (recklessness connotes "a degree of negligence"), *id.* at 93 (dissenting opinion of Justice O'Connor) (describing the majority opinion as authorizing punitive damages for "reckless violations of the Constitution").

The Restatement (Second) of Torts takes a similar approach. To obtain punitive damages a plaintiff must demonstrate "the defendant's evil motive or his reckless indifference to the rights of others." Restatement (Second) of Torts § 908(2) (1997). "Reckless indifference to the rights of

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[26] 461 U.S. at 37, 41, 51 (majority opinion), *id.* at 61-85 (Rehnquist, J., dissenting), *id.* at 94 (O'Connor, J., dissenting).

others and conscious action in deliberate disregard of them (see §500) may provide the *necessary state of mind* to justify punitive damages." *Id.* at cmt. b (emphasis added). It is the absence of that requisite mental state, not the mildness or infrequency of the violation, which precludes punitive awards.[27] The recklessness standard cited in section 500 of the Restatement turns on the mental state of a defendant.[28]

When Congress has established a statutory standard for the award of punitive damages, it has virtually always made the defendant's mental state the standard to be considered in determining whether such an award should be made. The existence of a culpable mental state is the sole criterion for the award of punitive damages in thirteen of the fourteen statutes which provide a specific standard for punitive damages. Those statutory standards vary from "gross negligence"[29] to "reckless disregard of the law,"[30] "willful disregard,"[31] "conscious, flagrant indifference to . . .rights,"[32]

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[27] "Punitive damages are not awarded for mere inadvertence, mistake, errors of judgment and the like, which constitute ordinary negligence." *Id.* at cmt. b.

[28] Restatement (Second) of Torts, § 500 provides:

> "The actor's conduct is in reckless disregard of the safety of another if he does an act . . . knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent."

[29] 26 U.S.C. § 7431(c)(1)(B)(ii); 42 U.S.C. § 669a(c)(3)(A).

[30] 18 U.S.C. § 2724(b)(2).

[31] 11 U.S.C. § 363(n).

[32] 42 U.S.C. § 14503.

"willfulness,"[33] "bad faith"[34] and "intentional violations."[35] Two statutes provide that the magnitude or egregiousness of a violation is a factor bearing on the *amount* of punitive damages, but not on the availability of such an award.[36]

Against the background of this long history of basing punitive awards on a showing that a defendant acted with a culpable mental state, this Court should not lightly infer that Congress intended that a completely different type of standard be applied under section 1981a(b)(1). "[I]f Congress had meant the courts to depart from well-established legal standards, it would have made that intention clear in the

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[33] 12 U.S.C. § 3417(a)(3); 15 U.S.C. § 78u(h)(7)(A)(iii); 15 U.S.C. § 1681n(a)(2); 18 U.S.C. § 2707(c); 18 U.S.C. § 2724(b)(2); 26 U.S.C. § 7431(c)(1)(B)(ii); 42 U.S.C. § 14503.

[34] 15 U.S.C. § 78u(h)(7)(A)(iii); 15 U.S.C. § 1116(d)(11).

[35] 12 U.S.C. § 3417(a)(3); 15 U.S.C. § 78u(h)(7)(A)(iii); 15 U.S.C. § 1681n(a)(2); 18 U.S.C. § 2710(c)(B); 42 U.S.C. § 300aa-23(d)(2)(a).

[36] 15 U.S.C. § 1679g(b) provides that in determining the amount of punitive damages for violations of certain consumer rights "the court shall consider, among other relevant factors--

> (1) the frequency and persistence of noncompliance by the credit repair organization;
>
> (2) the nature of the noncompliance;
>
> (3) the extent to which such noncompliance was intentional; and
>
> (4) in the case of any class action, the number of consumers adversely affected."

The amount of punitive awards under 15 U.S.C. § 1691e(b) turns on "among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional."

language of the act." (Pet. App. 50a). Surely Congress would not have used the words "reckless indifference" to signal its desire that neither recklessness nor indifference be considered. The terms of section 1981a(b)(1), authorizing a punitive award where a defendant had engaged in a discriminatory practice "*with* . . . reckless indifference," clearly refer to a culpable mental state accompanying the discrimination, rather than to specific kinds of discriminatory acts. The suggestion that section 1981a(b)(1) requires proof of pervasive discrimination is belied by the statutory language which authorizes such awards for "*a* discriminatory practice." (emphasis added).

B. *The Ordinary Meaning of the Phrase "Reckless Indifference" is Consistent with the Structure of Section 1981a*

(1) The court below reasoned that the phrase "reckless indifference" in section 1981a(b)(1) could not be read literally because section 1981a(a)(1) limits punitive damage awards under Title VII to instances of intentional discrimination. Such a literal reading of section 1981a(b)(1), the court insisted, would be inconsistent with what it believed was an implicit congressional intent to create a "two-tiered" system of remedies. (Pet. App. 5a, 7a-8a, 16a). That two-tiered system, the court asserted, was designed to assure that punitive damages were not available in "every garden-variety" case of intentional discrimination against women or racial minorities. (Pet. App. 18a; *see id.* at 5a (punitive damages not to be available in "the standard case of intentional discrimination")).

This Court has twice rejected this very method of ascertaining the statutory standard for punitive damages. In *Smith v. Wade*, 461 U.S. 30 (1983), the defendant argued that

section 1983 should be construed so that the standard for punitive damages would be "higher in every case than the underlying standard for liability in the first instance." 461 U.S. at 51. In holding otherwise, the Court stressed that there were a number of torts which required such a heightened degree of culpability that evidence sufficient to meet that liability standard would also satisfy the traditional punitive damage standard.

> There has never been any general common-law rule that the threshold for punitive damages must always be higher than that for compensatory liability. On the contrary, both the First and Second Restatements of Torts have pointed out that "in torts like malicious prosecution that require a particular antisocial state of mind, the *improper motive* of the tortfeasor is both a necessary element in the cause of action and a reason for awarding punitive damages." Accordingly, in situations where the standard for compensatory liability is as high as or higher than the usual threshold for punitive damages, most courts will permit awards of punitive damages without requiring any extra showing.

461 U.S. at 53 (emphasis added)(footnote omitted). The Court also noted that even in such cases the standards governing the actual award of compensatory and punitive damages were necessarily different, because on the requisite showing compensatory damages "are mandatory," while punitive damages "are never awarded as of right . . . the question whether to award punitive damages is left to the jury." 461 U.S. at 52 (citation omitted). As the court below acknowledged, the actual text of section 1981a(b)(1) was taken from the decision in *Smith v. Wade* (Pet. App. 10a, 12a); it is difficult to believe that Congress in expressly using

the language from the holding in *Smith* intended tacitly to reject the reasoning of the underlying decision.

The defendant in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), unsuccessfully advanced a similar argument.[37] The statute in that case imposed liquidated damages for "willful" violations of the ADEA, a term which the Court had construed to mean "reckless disregard" or "indifference" on the part of an employer. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 126-30 (1985). A number of lower courts had refused to adhere to *Thurston*, reasoning that an additional requirement of "outrageous" or "egregious" conduct was needed to preserve a two-tiered remedial scheme under the ADEA. *Hazen Paper Co.*, 507 U.S. at 615.[38] This Court rejected both the reasoning and holding of those cases:

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[37] Brief for Petitioners, No. 91-1600, at 46-47 ("a plaintiff must show both that his employer knew or showed reckless disregard that its conduct violated the statute, and further that the employer's actions were repeated . . . or were otherwise harsh, egregious or outrageous. Requiring such proof to establish willfulness in disparate treatment actions fulfills the Congressional intent of a two-tiered ADEA liability.") In advancing this argument the petitioners insisted that liquidated damages under the ADEA were the equivalent of punitive damages. *Id.* at 44. They argued that the *Thurston* "reckless disregard" standard needed to be modified precisely because such language did *not* entail any requirement of egregious conduct. *Id.* at 21-22, 38-47. *See* Reply Brief for Petitioners, No. 91-1600, at 18 (liquidated damages should be permitted "only in cases where the employer's actions meet a higher standard of outrageous or egregious conduct"); *id.* at 13-19.

[38] *E.g. Lockhart v. Westinghouse Credit Corp.*, 879 F. 2d 43, 57-58 (3d Cir. 1989)("systematic discrimination" would constitute such "outrageous conduct"); *Hansard v. Pepsi-Cola Metro. Bottling Co.*, 865 F. 2d 1461, 1470 (5th Cir.) ("actions" must be "egregious"), *cert. denied*, 493 U.S. 842 (1989); *Dreyer v. ARCO Chem. Co.*, 801 F. 2d 651, 658 (3d Cir. 1986) ("outrageous conduct" required), *cert. denied*, 480 U.S. 906 (1987).

> The chief concern of these Circuits has been that the application of *Thurston* would defeat the two-tiered system of liability intended by Congress, because every employer that engages in informal age discrimination knows or recklessly disregards the illegality of its conduct.
>
> We believe that this concern is misplaced. The ADEA does not provide for liquidated damages "where consistent with the principle of a two-tiered liability scheme." It provides for liquidated damages where the violation was "willful."

507 U.S. at 615-16. The court below sought to distinguish *Hazen Paper Co.* on the ground that the statutory language in that case requires "willful" action, not "reckless indifference." (Pet. App. 15a). But *Thurston*, and *Hazen Paper Co.* itself, interpreted the term "willful" in the ADEA to mean recklessness. *Thurston*, 469 U.S. at 126-30; *Hazen Paper Co.*, 507 U.S. at 615-17.

(2) *Hazen Paper Co.* explained that, even if the text of the ADEA had expressly mandated a two-tiered remedial scheme, utilization of a recklessness standard would be consistent with such a requirement. The Court stressed that "[t]he ADEA is not an unqualified prohibition on the use of age in employment decisions, but affords the employer a 'bona fide occupational qualification' defense . . . and exempts certain subject matters and persons . . . ." 507 U.S. at 616 (citations omitted). Title VII contains similar limitations.

The court of appeals below believed that, in practice, the BFOQ ("bona fide occupational qualification") exemption in

the ADEA is far broader than the Title VII BFOQ.[39] But the terms of the BFOQ exemptions in Title VII and the ADEA are virtually identical. *Compare* 42 U.S.C. § 2000e-2(e)("bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise") *with* 29 U.S.C. § 623(f)(1) ("bona fide occupational qualification reasonably necessary to the normal operation of the particular business"). This Court noted in *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 412 (1985), that Congress borrowed the concept and language of a BFOQ exemption from Title VII when it included the BFOQ clause in the ADEA in 1967. This Court has relied on Title VII BFOQ caselaw when interpreting the ADEA BFOQ clause,[40] and vice versa.[41] In *International Union, UAW v. Johnson*

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[39] For this surprising conclusion it cited "the widespread belief among employers that age can sometimes be a bona fide occupational qualification — a belief reflected in mandatory retirement programs." (Pet. App. 17a). With the exception of certain law enforcement and firefighting jobs, however, age-based mandatory retirement requirements were generally outlawed by the 1986 amendments to the ADEA, six years before *Hazen Paper Co.* and a dozen years before the decision in the instant case. 100 Stat. 3342, 3344. Cases in which employers have asserted BFOQ defenses under the ADEA, far from being "widespread", are relatively uncommon. Most such cases involve police, firefighters, and operators of airplanes and buses. *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985)(flight engineers); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985)(pilots); *Johnson v. Mayor and City Council of Baltimore*, 472 U.S. 353 (1985)(firefighters); *Usery v. Tamiami Trail Tours, Inc.*, 531 F. 2d 224 (5th Cir. 1976)(bus operators); *Hodgson v. Greyhound Lines, Inc.*, 499 F. 2d 859 (7th Cir. 1974)(bus drivers), *cert. denied*, 419 U.S. 1122 (1975).

[40] *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 413 n. 18, 414 n. 19, 416 (1984).

[41] *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 201-03 (1991).

Controls, Inc., 499 U.S. 187, 201 (1991), this Court observed with regard to the Title VII exemption, "[t]he BFOQ defense is written narrowly, and this Court has read it narrowly. . . . We have read the BFOQ language of . . . the Age Discrimination in Employment Act . . . , which tracks the BFOQ provision in Title VII, just as narrowly."

Like the ADEA, Title VII is subject to a number of express statutory exemptions; in several instances the exemptions contained in Title VII are identical or similar to the exemptions in the ADEA. (1) Section 701(b) defines "employer" to exempt employers who had fewer than fifteen employees in certain weeks in the prior year. 42 U.S.C.§ 2000e(b); *compare* 29 U.S.C. § 630(b)(similar exemption under the ADEA for employers with less than 20 employees). (2) Section 701(f) defines "employee" to exempt elected officials and their personal and policy-making staff. 42 U.S.C. § 2000e(f); *compare* 29 U.S.C. § 630(f)(identical exemption under the ADEA). (3) Section 702 exempts from Title VII aliens, and in some instances United States citizens, working outside the United States for American firms or certain subsidiaries. 42 U.S.C. § 2000e-1; *compare* 29 U.S.C. § 623(h)(similar provision under the ADEA). (4) Section 701(a)(1) exempts Indian tribes and certain agencies of the District of Columbia. 42 U.S.C. § 2000e(b)(1). (5) Section 701(a)(2) exempts any bona fide private membership club. 42 U.S.C. § 2000e(b)(2). (6) Section 703(i) exempts certain practices of businesses "on or near an Indian reservation." 42 U.S.C. § 2000e-2(i). (7) Section 703(f) exempts actions taken with regard to individuals who are members of the Communist Party or certain related organizations. 42 U.S.C. § 2000e-2(f). (8) Title VII, like the ADEA, defines "employee" as "an individual employed by an employer", which means that the coverage of both statutes will turn in some instances on the at times elusive distinction

between an employee and an independent contractor. 29 U.S.C. § 630(f); 42 U.S.C. § 2000e(f). Application of many of these provisions may raise legal or factual issues.

Title VII, like the ADEA, also exempts a number of specific practices which would otherwise fall within the scope of the statutory prohibition. Section 702(a) permits certain religious organizations to hire only individuals of a particular denomination. 42 U.S.C. § 2000e-1(a). Section 703(e)(2) allows educational institutions to limit employment to persons of a particular religion if the institutions are substantially owned or controlled by a religion or if their curriculum is directed toward the propagation of a specific religion. 42 U.S.C. § 2000e-2(e). This Court has twice held that certain forms of affirmative action are permitted by Title VII. *Johnson v. Transportation Agency*, 480 U.S. 616 (1987); *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

Judicial experience with the application of Title VII has identified a number of areas in which intentional action may or may not be "discrimination." First, in some, but not all circumstances, the failure to consider a protected characteristic may violate Title VII. *Compare Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 120-23 (1985), *with Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 71 (1986). Second, unsettled questions remain regarding the scope of the Pregnancy Discrimination Act. 42 U.S.C. § 2000e(k).[42]

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[42] There are, for example, disputes about what medical conditions are "related" to pregnancy or child birth. *Compare Wallace v. Pyro Mining Co.*, 1991 U.S. App. LEXIS 30157, at *3 (6th Cir. 1991) (breast feeding not shown to be within scope of Pregnancy Discrimination Act) *with Turic v. Holland Hospitality Inc.*, 849 F.Supp. 544 (W.D. Mich. 1994), *aff'd in part, rev'd in part*, 85 F.3d 1211 (6th Cir. 1996) (abortion within the scope of the Act), and *Pacourek v. Inland Steel Co.*, 858 F.Supp. 1393 (N.D. Ill. 1994) (infertility within scope of the Act).

Third, with regard to the anti-retaliation prohibition in section 704(a) of Title VII (42 U.S.C. § 2000e-3(a)), considerable disagreement continues among the lower courts regarding both which employee actions are within the scope of the protection and what employer responses are forbidden retaliation.[43]

In sum, Title VII, like the ADEA, is neither an absolute prohibition against all forms of intentional discrimination nor invariably a standard so clear that any intentional act of discrimination would necessarily involve reckless indifference.

(3) In insisting that a literal interpretation of "reckless indifference" would collapse what it believed was supposed to be a two-tiered remedial scheme, the court below proceeded on the assumption that the only illegal actions to which section 1981a(b)(1) applies are violations of Title VII. In fact, however, under section 1981a(a)(2), the remedies in section 1981a extend as well to violations of the Americans With Disabilities Act. Section 1981a(a)(2) provides in pertinent part:

> Disability. In an action brought . . . as provided in section 107(a) of the Americans with Disabilities Act . . . against a respondent . . . who violated . . . section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), or committed a violation of section 102(b)(5) of the Act . . ., the complaining party may recover compensatory and punitive damages as allowed in subsection (b) . . . .

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[43] *Compare Collins v. State of Illinois*, 830 F.2d 692, 702-03 (7th Cir. 1987) (forbidden retaliation not limited to discharge, demotion, or reduction in pay); *Paxton v. Union National Bank*, 688 F.2d 552, 572 (8th Cir. 1982) (same); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996) (same), *with Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir.), *cert. denied*, 118 S. Ct. 336 (1997)(contra).

The prohibitions of section 102 of the ADA, like the prohibitions of the ADEA and of Title VII, are subject to several distinct limitations. Because the scope of those limitations, too, raise a variety of legal and factual issues, it would be entirely possible for an employer which reasonably believed it was complying with the law — and thus could not be said to be guilty of reckless indifference — to nonetheless violate section 102.

First, the ADA, unlike Title VII, does not apply to most employees. The ADA prohibits only discrimination against an individual with a "disability," a term defined by the statute to include persons who have "a physical or mental impairment that substantially limits one or more of the major life activities of such individual," who have a record of such impairment, or who are regarded as having such an impairment. 42 U.S.C. § 12102(2). The statutory definition necessarily raises significant issues, regarding, for example, what is a "major life activit[y]". *See* 29 C.F.R. § 1630.2(i)-(l). Second, the prohibitions of section 102 apply only to "qualified" individuals with a disability. 42 U.S.C. § 12111(8). An individual is not "qualified" if he or she cannot "perform the essential functions of the employment position" in question. *See* 29 C.F.R. § 1630.2(m). In order to determine whether a discriminatory act violates the ADA, an employer, like a court, may need to make a variety of factual determinations, and in some instances deal with still unsettled issues in the law.

Third, section 103(b) provides that an employer may refuse to hire an individual with a disability into a position where he or she would pose a "direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b). Thus, if, for example, an employer, acting in good faith reliance on medical advice from a physician with

relevant expertise, declined to hire an applicant with a serious contagious disease, that employer would not be subject to an award of punitive damages, even if a court should later conclude that the individual did not in fact pose a threat to the health of others. *Cf. School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987).

Congress was without doubt well aware of those issues when it decided to authorize punitive damages in ADA cases; it would be inconsistent with that congressional decision for the courts to require in ADA cases a standard of certainty so high as to generally preclude punitive awards. In an ADA case, as in a Title VII case, determination of the presence or absence of reckless disregard will typically be a fact-specific question for the trier of fact. But the structure of section 102 of the ADA demonstrates that the court below was in error when it asserted that a literal reading of section 1981a(b)(1) would necessarily result in punitive awards in all cases within the scope of section 1981a.

C. *The Ordinary Meaning of the Phrase "Reckless Indifference" Is Consistent with the Legislative History of Section 1981a*

Given the clarity of the language of section 1981a(b)(1), and its consistency with the overall structure of the section, the plain meaning of the statute could be overridden by legislative history — if at all — only in the most compelling circumstances. The touchstone "for interpretation of a statute 'is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.'" *Kaiser Aluminum v. Bonjorno*, 494 U.S. 827, 835 (1990). "[W]hen a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Estate of Cowart v. Nicklos*

Drilling Co., 505 U.S. 469, 475 (1992) (citation omitted). At the least, that would require a showing that the relevant committee reports had declared in unambiguous and authoritative terms that the words "reckless indifference" referred not to a culpable mental state but to a particular type of discriminatory practice.

The committee reports in question contain no such admonition that the terms of section 1981a are to be read in some anti-literal manner. Far from declaring that egregious or outrageous conduct is the intended meaning of "reckless indifference," the reports do not single out particular types of discriminatory practices — egregious, outrageous, pervasive or otherwise — as required for punitive damages. The specific explanations of the punitive damage standard paraphrased the text of the then pending legislation. The 1991 report of the House Education and Labor Committee, for example, explained:

> Punitive damages would also be available where the respondent (other than a government, governmental agency or political subdivision) engaged in an unlawful employment practice with malice, or with reckless or callous indifference to the federally protected rights of others. This language sets the same standard courts have applied under section 1981. *See, e.g., Rowlett v. Anheuser-Busch, Inc.*, 832 F. 2d 194, 205 (1st Cir. 1987); *Beauford v. Sisters of Mercy-Province of Detroit, Inc.*, 816 F. 2d 1104, 1108-09(6th Cir. 1987), *cert. denied*, 484 U.S. 913 (1987); *see also Smith v. Wade*, 461 U.S. 30, 56 (1983)(construing 42 U.S.C. sec. 1983).

H.R. Rep. No. 102-40(I), 102d Cong., 1st Sess. at 74 (footnotes omitted). Opponents of the bill expressly objected to this citation to *Rowlett*, noting that that decision had

rejected any requirement of "outrageous behavior." (*Id.* at 143-44 n. 14)(Additional views of Mr. Armey). The report of the House Judiciary Committee explained:

> This standard for punitive damages is taken directly from civil rights case law. As was noted in *Stallworth v. Shuler*, 777 F. 2d 1431, 1435 (11th Cir. 1985)(a Section 1981 case):
>
> > Punitive damages are of course available under 42 U.S.C. §§ 1981 and 1983 "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protection rights of others."
>
> quoting *Smith v. Wade*, 461 U.S. 30, 56 (1983)(a Section 1983 case).

H.R. Rep. No. 102-40(II), 102nd Cong., 1st Sess. at 29. Nothing in these passages indicated that section 1981a(b)(1) was to be read other than literally.

The court of appeals asserted that the actual meaning of this passage — and thus of section 1981a(b)(1) — should be divined by scrutinizing the cited cases for evidence that "reckless indifference" might, in fact, mean something else. (Pet. App. 9a-15a). On this view, the framers of the committee reports intended the quoted passage to declare that "reckless indifference means egregious conduct," and decided to communicate that intent covertly by citing cases which purportedly adopt an egregious conduct standard. This approach is fatally flawed. It is simply not to believed that the House Education and Labor Committee and the House Judiciary Committee would have chosen to send the full House such a coyly encrypted message. When a committee report describes the provision of a bill as adopting a particular

standard, and then cites cases as authority for that standard, the committee must be presumed to have understood the cases to adopt the same standard as that set out in the report itself. Congressional committees could not risk ever citing cases in their reports if the courts were thereafter free to disregard the actual language of the reports and legislation, and instead treat the report as a commission to give to the legislation whatever meaning judges thereafter might choose to read into the cited opinions. Surely, the members of the 102nd Congress themselves could not have understood the reports as a warning that the meaning of the bill was to be gleaned, not from the text of the bill or the reports, but by reading and interpreting the cited opinions.

The manner in which the court of appeals implemented this unorthodox method of analyzing legislative history well illustrates its unsoundness. The court below readily conceded that one of the cited lower court cases, *Rowlett v. Anheuser-Busch, Inc.*, "supports Kolstad's position" (Pet. App. 9a; *see* 832 F. 2d at 205-07), and simply ignored the reference to another: *Stallworth v. Shuler*, 777 F.2d 1431 (11th Cir. 1985). The elements of the discriminatory scheme which *Stallworth* recognized as indicating the defendant's awareness of the illegality of its actions bear a striking resemblance to the facts of the instant case. In upholding the award of punitive damages, the court of appeals in *Stallworth* had stressed that the trial court had considered the defendant's "actions in conducting a sham selection procedure and in having job requirements changed after the fact to be deliberate and knowing actions to violate plaintiff's civil rights." 777 F. 2d at 1435.[44]

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[44] In upholding punitive awards under Title VII, a number of lower courts have relied on evidence that an employer perpetrated the discrimination through a deliberate scheme, engaged in duplicitous

The court of appeals insisted, however, that the opinion of a single judge[45] in a third cited case, *Beauford v. Sisters of Mercy-Province of Detroit*, 816 F.2d 1104, supported an egregious conduct standard. (Pet. App. 8a). In fact, however, *Beauford* contains five different articulations of the culpable mental state (other than malice) sufficient to warrant punitive damages: "reckless or callous indifference to the federally protected rights of others," "reckless or callous disregard," "reckless or callous indifference of an egregious character," "willfulness," and "egregious disregard of the plaintiff's federal rights." 816 F. 2d at 1108-09 and n. 4. *Beauford* refers to egregious conduct, not as a definition of this mental state, but as an alternative basis for punitive damages.[46] It is inconceivable that the reference in one of the House reports to this loosely worded lower court opinion could have been intended by the authors or understood by

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behavior, or lied about its actions or motives. *Kim v. Nash Finch Co.*, 123 F. 3d 1046, 1066-67 (8th Cir. 1997)(relying on fact that perpetrator both lied and doctored victim's personnel file); *Merriweather v. Family Dollar Stores of Ind., Inc.*, 103 F. 3d 576, 582 (7th Cir. 1996)(punitive award justified where employer "attempt[ed] to deceive the court, by presenting false reasons for its decision to discharge"); *Patterson v. P.H.P. Healthcare Corp.*, 90 F. 3d 927, 943 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 767 (1997)(relying on discriminator's actions "in falsifying documents to establish a paper trail.")

[45] Of the three judges participating in this decision, one dissented and one concurred only in the result. *Beauford*, *supra*, 816 F. 2d at 1110.

[46] *E.g.* 816 F. 2d at 1109 ("The imposition of punitive damages in civil rights actions has generally been limited to cases involving egregious conduct *or* a showing of willfulness or malice . . . .")(emphasis added) (citations omitted).

Even the Sixth Circuit does not appear to interpret *Beauford* to require proof of egregious conduct. *Moreno v. Consolidated Rail Corp.*, 63 F. 3d 1404, 1419-21 (6th Cir. 1995), *vacated on other grounds*, 99 F. 3d 782 (6th Cir. 1996)(en banc).

congressional readers as an authoritative admonition that neither the reports nor the bill itself meant what they appeared to say.[47]

The court below offered an even more far-fetched account of the reports' citations to this Court's decision in *Smith v. Wade*. The court acknowledged that the passage in *Smith* actually referred to by the committees was the holding at the end of the majority opinion. (Pet. App. 10a).

> We hold that a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.

461 U.S. at 56. The language of section 1981a(b)(1) was avowedly taken from this very passage. The court below, however, simply dismissed the Committee's explicit reference to this very passage, deeming it a mere "isolated citation to *Smith's* linguistic formula." (Pet. App. 10a). Having thus set aside the portion of the *Smith v. Wade* opinion actually relied upon by the House reports, the court of appeals then proceeded to construe the reports to adopt as the statutory standard a very different rule which that court argued could be connected in some way to *Smith*.[48]

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[47] The court of appeals argued, in the alternative, that the authoritative meaning of the House Report should be divined by reading and construing pre-1991 section 1981 cases which the House Committee never cited at all. (Pet. App. 8a).

[48] "[W]e construe *Smith* as establishing a threshold requirement of egregiousness for the imposition of punitive damages in § 1983 cases." (Pet. App. 12a).

First, rather than rely on the actual holding in the 1983 decision in *Smith*, the court of appeals proposed to invoke instead, differently worded passages in decisions handed down in 1859 and 1876 that had been quoted in *Smith*.[49] But *Smith v. Wade* is, and was referred to by the House Report as, a *decision*, not some sort of A.L.R. Annotation from which later courts (or members of Congress) were free to pick whichever citation they might fancy. The majority opinion in *Smith v. Wade* quotes sixteen prior opinions and cites more than 150 others; only the holding in the majority opinion embodies the standard referred to in the committee reports.

Second, the court below cited a passage in *Smith v. Wade* which observed that "deterrence of future egregious conduct is a primary purpose of . . . punitive damages." (Pet. App. 11a *quoting* 461 U.S. at 49). But this passage is immediately followed by a citation to section 908 of the Restatement (Second) of Torts regarding "outrageous conduct," which in turn explicitly explains that it is "the defendant's evil motive or his reckless indifference to the rights of others" which renders the conduct "outrageous."[50] "As *Smith v. Wade* and § 908 of the Restatement (Second) of Torts make clear, misconduct is 'extraordinary' (in the language of the *Smith v. Wade* instruction) or 'outrageous' (in the language of the Restatement) *because of the intent of the wrongdoer*." *Rowlett*

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[49] Pet. App. 11a-12a (*quoting Philadelphia, W. & B. R. Co, v. Quigley*, 62 U.S. 202, 214 (1859), and *Milwaukee & St. Paul R. Co. v. Arms*, 91 U.S. 489, 495 (1876)).

[50] "Punitive damages may be awarded for conduct that is outrageous, *because* of the defendant's evil motive or his reckless indifference to the rights to others." Restatement (Second) of Torts, § 908(2) (1997)(emphasis added). Similarly, comment b states, "The conduct must be outrageous, either *because* the acts are done with an evil motive or *because* they are done with reckless indifference to the rights of others." (emphasis added).

v. Anheuser-Busch, Inc., 832 F. 2d at 206 (emphasis in original).

Third, the court of appeals stressed that the plaintiff in *Smith v. Wade*, in order to establish a violation of the Eighth Amendment, had been required to prove "physical abuse of such base, inhumane and barbaric proportions as to shock the sensibilities." (Pet. App. 11a *quoting* 461 U.S. at 50-51.) It reasoned that *Smith* therefore meant that punitive damages could be awarded only for discriminatory conduct "equivalen[t]" to such barbaric physical abuse. (Pet. App. 11a). This analysis improperly conflates the standard for establishing a violation of the Eighth Amendment with the standard for awarding punitive damages under section 1983. The actual holding in *Smith* contains no requirement that barbarity be established in order to obtain punitive damages;[51] it is expressly an announcement of the standard in all section 1983 cases, none of which — other than Eighth Amendment cases — requires proof of any such abuse to establish a constitutional violation. To establish the constitutional violation at issue in *Smith*, the plaintiff was also obligated to prove that the he was in custody and had been injured as a result of state action, yet neither such proof is required in order to obtain punitive damages under Title VII.

As we explained in part I(B)(2), *supra*, not every case of intentional discrimination will involve reckless indifference. The legislative history of section 1981a(b)(1) reflects an

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[51] "The Court [in *Smith*] made no mention of any requirement that, in addition to charging the jury about the level of intent necessary to support punitive damages, a trial court also explain to the jury that the misconduct be 'extraordinary' or 'outrageous.'" *Rowlett v. Anheuser-Busch, Inc.*, 832 F. 2d at 206.

understanding of that distinction.[52] Beyond that, the history is somewhat conflicting. The legislative history of the 1991 Civil Rights Act, as this Court noted *Landgraf v. USI Film Products*, 511 U.S. 244, 262 & n. 15 (1994), was particularly partisan; not surprisingly, characterizations of the distinction varied somewhat among the supporters and opponents and changed over the course of the debates. In April 1991, opponents of section 1981a(b)(1) described it with alarm in quite expansive terms:

> [O]ne might ask when, if ever a jury would find that proven intentional discrimination by an employer did not constitute the requisite level of abuse. Indeed, in the case of *Rowlett v. Anheuser-Busch* . . . the court awarded . . . $300,000 in punitive damages . . . under 42 U.S.C. 1981 even though there was [sic] "no overt acts of racial discrimination." . . . In rejecting the employer's contention that some form of outrageous behavior was required, although applying the same test as H.R.1 proposes, the court noted, "After all, can it really be disputed that intentionally discriminating against a black man on the basis of his skin color is worthy of some outrage?" . . . In sum, the court equated a jury finding of intent . . . with the level of abuse necessary to award punitive damages. Most alarmingly, this case has been cited with approval in the Majority Report.

H.R. Rep. No. 102-40(I), *supra*, at 143-44 n.14 (Additional Views of Mr. Armey). In October 1991, the very members who had earlier led the opposition to the bill, having accepted section 1981a(b)(1) without any changes in the standard for

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[52] H.R. Rep. No. 40(I), 102nd Cong., 1st Sess. at 72.

punitive damages, now characterized that same language as extremely restrictive. *E.g.*, 137 Cong. Rec. 15,473 (Oct. 30, 1991)(Interp. Memo of Sen. Dole, *et al.*) ("[p]unitive damages. . . are to be awarded only in extraordinarily egregious cases.") The complex posturing that often characterized the floor debates regarding this controversial legislation are — as the Court in *Landgraf* recognized, 511 U.S. at 262 & n. 15; 511 U.S. at 287 & n. 1 (Scalia, J. concurring in the judgment) — of limited value. In any event, "[t]he short answer to this is that the plain language of the statute . . . is inconsistent with these statements." *Luciano v. Olsten Corp.*, 110 F. 3d 210, 220 (2d Cir. 1997).

II. PUNITIVE DAMAGES ARE AUTHORIZED UNDER SECTION 1981A(B)(1) WHERE THE DEFENDANT INTENDED TO VIOLATE FEDERAL LAW OR ACTED WITH ILL WILL OR INTENT TO CAUSE INJURY

Section 1981a(b)(1) also authorizes punitive damage awards in any case in which the defendant engaged in a discriminatory practice "with malice." The treatment of this alternative standard by the court of appeals is exceedingly obscure. The only portion of the opinion that appears to refer to this standard requires proof of "genuine spite and malevolence." (Pet. App. 13a). A footnote on that same page, however, seems to deny that the majority is equating "malevolence" with "malice." (Pet. App. 13a n. 4).

Because the language in section 1981a(b)(1) was avowedly taken directly from *Smith v. Wade*, "malice" should be construed to encompass those circumstances other than reckless indifference in which the *Smith* majority believed punitive damages would be warranted. *Smith v. Wade* indicated that punitive damages would also be permissible where a defendant had acted out of ill will, with an intent to

cause harm, or with an intent to violate the law. 461 U.S. at 37, 41, 51.

The en banc majority acknowledged that the head of respondent's Washington, D.C. office had used the epithet "bitch" to refer to several professionally prominent women. It dismissed this evidence, however, arguing that "sexist remarks, tasteless and lamentable though they may be, are 'not always conclusive of sex discrimination.'" (Pet. App. 22a). The appellate court erred in attempting to impose its own assessment of the significance and weight of this evidence. Evaluation of such remarks is the core function of the trier of fact, in this case the jury. Whether or not use of such an epithet demonstrates genuine misogyny would undoubtedly require a fact-specific assessment of the circumstances in which the statement was made. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 577-79 (1985).

The court of appeals also dismissed this evidence on the ground that "[Washington, D.C. officer manager] Wheat . . . did not make the decision to promote Spangler over Kolstad; [national executive director] Allen did." (Pet. App. 22a). Less than a year ago in *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257 (1998), this Court expressly rejected this sort of distinction. The Court in *Ellerth* made clear that an employer is liable for discriminatory actions of a supervisor, even where, as here, higher officials might also be involved in the decision. 118 S. Ct. at 2269 *citing Shager v. Upjohn Co.*, 913 F. 2d 398, 405 (7th Cir. 1990).[53] This case easily falls within

[53] The discriminatory supervisor in *Shager* had not personally dismissed the plaintiff, but instead had allegedly helped to bring about that dismissal by the employer's Career Path Committee "by portraying Shager's performance to the committee in the worst possible light." 913 F. 2d at 405.

the scope of *Ellerth*. The denial of a promotion is, of course, a tangible employment action; there was ample evidence that Wheat's actions and views played a significant role in Allen's ultimate decision. (*See* pp. 4-6, *supra*). At trial, respondent sought without success to convince the jury that Allen's actions were not tainted by Wheat's biases;[54] such factual disputes cannot be relitigated here.

[54] *Compare* Oct. 26, 1995 Tr. at 32 (closing argument of counsel for respondent)("It doesn't make a difference what 'Skip' Wheat did or did not want in terms of the selection, because . . . the person who was making this decision was Dr. Allen, not Mr. Wheat.") *with id.* at 58(closing argument of counsel for petitioner)("Did Leonard Wheat have something to do with selecting the person for this job? You bet he did.")

CONCLUSION

For the above reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

STATUTORY APPENDIX

Section 102 of the Civil Rights Act of 1991 states as follows:

Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil Rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3), and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(2) Disability

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964, (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of Title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of Title 29 and the regulations implementing section 791 of Title 29, or who violated the requirements of section 791 of Title 29 or the regulations implementing section 791 of Title 29

concerning the provision of a reasonable accommodation, or section 102 of the American with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(3) Reasonable accommodation and good faith effort

In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the American with Disabilities Act of 1990, or regulations implementing section 791 of Title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of

relief authorized under section 706(g) of the Civil Rights Act of 1964.

(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

(4) Construction

Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1981 of this title.

(c) Jury trial

If a complaining party seeks compensatory or punitive damages under this section—

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3) of this section.

(d) Definitions

As used in this section:

(1) Complaining party

The term "complaining party" means—

(A) in the case of a person seeking to bring an action under subsection (a)(1) of this section, the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

(B) in the case of a person seeking to bring an action under subsection (a)(2) of this section, the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or proceeding under section 794a(a)(1) of Title 29, or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.).

(2) Discriminatory practice

The term "discriminatory practice" means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a) of this section.

42 U.S.C. § 1981a.

The relevant provisions of the Americans with Disabilities Act of 1990 ("ADA") are as follows:

Section 3(2) of the ADA provides that, as "used in this chapter,"

* * *

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

42 U.S.C. § 12102(2).

Section 101 of the ADA contains the following definitions:

* * *

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be

given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term "reasonable accommodation" may include—

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time and modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

* * *

42 U.S.C. § 12111(8)-(9)

Section 102 of the ADA, entitled "Discrimination," provides as follows:

(a) General Rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes—

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration—

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship

on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such tests purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Covered entities in foreign countries

(1) In General

It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if

compliance with this section would cause such covered entity to violate the law of the foreign country in which such in which such workplace is located.

(2) Control of corporation

(A) Presumption

If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception

This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) Determination

For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on—

(i) the interrelations of operations

(ii) the common arrangement;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control, of the employer and the corporation.

(d) Medical examinations and inquiries

(1) In general

The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(2) Preemployment

(A) Prohibited examination or inquiry.

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry

A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if—

(A) all entering employees are subject to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that—

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(4) Examination and inquiry

(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature of severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

42 U.S.C. § 12112.

Section 103 of the ADA contains the following "Defenses:"

(a) In general

It may be a defense to a charge of discrimination under this chapter than an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

* * *

42 U.S.C. § 12113(a)-(b).

APPENDIX B

FEDERAL STATUTES USING THE TERM "RECKLESS"

8 U.S.C. § 1324(a)(1)(A)(ii) and (iii) (imposing criminal penalties on persons who harbor an alien "knowing or in reckless disregard of the fact" that the alien entered the United States unlawfully).

8 U.S.C. § 1324c(a)(5) and (f) (imposing criminal penalties on persons who help prepare or file certain documents "with knowledge or in reckless disregard of the fact that" such document is false).

12 U.S.C. § 164(c) (authorizing civil penalties for the filing of certain false banking reports "knowingly or with reckless disregard for the accuracy of any information").

12 U.S.C. § 324 (authorizing imposition on member of the federal reserve system of civil penalties for filing false reports "knowingly or with reckless disregard for the accuracy of any information").

12 U.S.C. § 1464(v)(6) (authorizing civil penalties on federal savings institutions for filing false reports "knowingly or with reckless disregard for the accuracy of any information").

12 U.S.C. § 1467a(r)(3) (authorizing imposition of civil penalties on certain holding companies for filing false reports "knowingly or with reckless disregard for the accuracy of any information").

12 U.S.C. § 1701q-1(h) (authorizing civil penalties against mortgagors which have "actual knowledge of or act[ ] with deliberate ignorance of or reckless disregard for the prohibitions under this section").

12 U.S.C. § 1723i(g) (for purposes of certain civil penalties imposed on issuers "[t]he term 'knowingly' means having actual knowledge of or acting with deliberate ignorance of or reckless disregard for the prohibitions under this section").

12 U.S.C. § 1735f-14(g) (same definition regarding civil penalties imposed on certain participants in FHA programs).

12 U.S.C. § 1735f-15(h) (same definition regarding civil penalties against multifamily mortgagors).

12 U.S.C. § 1782(a)(3) (authorizing civil penalties against certain insured credit unions for filing false reports "knowingly or with reckless disregard for the accuracy of any information").

12 U.S.C. § 1786(k)(2)(B)(i)(II) and (C)(ii) (authorizing civil penalties against credit unions and officials who "recklessly engage[ ] in an unsafe or unsound practice" or "knowingly or recklessly cause a substantial loss" to a credit union).

12 U.S.C. § 1817(a)(1) (authorizing civil penalties against certain banks for submitting or publishing a false report "knowingly or with reckless disregard for the accuracy of any information").

12 U.S.C. § 1818(b)(6)(A)(ii) (authorizing order directing restitution where bank's violation "involved a reckless disregard for the law").

12 U.S.C. § 1847(d)(3) (authorizing penalty if any bank holding company submits a false report "knowingly or with reckless disregard for the accuracy of any information").

12 U.S.C. § 3110(c)(3) (authorizing civil penalties for certain foreign banks for filing a false report "knowingly or with reckless disregard for the accuracy of any information").

15 U.S.C. § 77t(d)(2)(B) (authorizing higher penalties in certain securities cases where violation involved "deliberate or reckless disregard of a regulatory requirement").

15 U.S.C. § 78u(d)(3)(B)(ii) and (iii)(aa) (same).

15 U.S.C. § 78u-2(b)(2) and (3)(A) (same).

15 U.S.C. § 78u-2(c)(1) (in determining whether to impose a penalty agency may consider whether violation involved "deliberate or reckless disregard of a regulatory requirement").

15 U.S.C. § 80a-9(d)(2)(B) and (C)(i) (authorizing higher penalties in certain securities cases where violation involved "deliberate or reckless disregard of a regulatory requirement").

15 U.S.C. § 80a-9(d)(3)(A) (in determining whether to impose a penalty Commission may consider whether violation involved "deliberate or reckless disregard of a regulatory requirement").

15 U.S.C. § 80a-17(i) (employment contract of certain underwriters cannot protect underwriter from liability for "reckless disregard of his obligations and duties under such contract").

15 U.S.C. § 80a-41(e)(2)(B) and (C)(I) (authorizing higher penalties in certain securities cases where violation involved "deliberate or reckless disregard of a regulatory requirement").

15 U.S.C. § 80b-3(i)(2)(B) and (C)(i) (authorizing higher penalties in certain securities cases where violation involved "deliberate or reckless disregard of a regulatory requirement").

15 U.S.C. § 80b-3(i)(3)(A) (in determining whether to impose a penalty Commission may consider whether violation involved "deliberate or reckless disregard of a regulatory requirement").

15 U.S.C. § 80b-9(e)(2)(B) and (C)(I) (authorizing higher penalties in certain securities cases where violation involved "deliberate or reckless disregard of a regulatory requirement").

15 U.S.C. § 1717a(f) (defining "knowingly" to mean "having actual knowledge of or acting with deliberate ignorance of or reckless disregard for the prohibitions under this section").

18 U.S.C. § 33(a) (imposing criminal penalties on any person who places an explosive or destructive substance on any motor vehicle "with a reckless disregard for the safety of human life").

18 U.S.C. § 35(b) (imposing criminal penalties on any person who imparts certain false information "willfully and maliciously, or with reckless disregard for the safety of human life").

18 U.S.C. § 922(q)(3)(A) (imposing criminal penalties on the discharge of firearms under certain circumstances "knowingly or with reckless disregard for the safety of another").

18 U.S.C. § 1365(a) (imposing criminal penalties on persons who tamper with a consumer product "with reckless disregard for the risk that another person will be placed in danger of death or bodily injury").

18 U.S.C. § 1861 (imposing criminal penalties on persons who falsely represent that certain land is public land "with intent to deceive the person to whom such representation is made, or . . . in reckless disregard of the truth").

18 U.S.C. § 1864 (a)(3) (imposing criminal penalties on person who use a hazardous device on federal land "with reckless disregard for the risk that another person will be placed in danger of death or bodily injury").

18 U.S.C. § 2424(a) (imposing filing requirement on any person who for the purpose of prostitution supports or harbors an alien "knowing or in reckless disregard of the fact that the individual is an alien.")

18 U.S.C. § 2724(b)(2) (authorizing punitive damages upon proof of "willful or reckless disregard of the law" regarding confidentiality of motor vehicle records).

18 U.S.C. § 3146(c) (affirmative defense to prosecution for failure to appear in court not available if defendant acted "in reckless disregard of the requirement to appear").

18 U.S.C. § 3591(a)(2)(D) ("reckless disregard for human life" an aggravating factor in capital case).

Federal Sentencing Guidelines § 2K1.5(b)(1) (15 level increase where the offense was committed "with reckless disregard for the safety of human life").

Federal Sentencing Guidelines § 2Q1.6(a)(3) (higher base offense level if offense involved "reckless disregard to the risk that another person would be placed in danger of death or serious bodily injury").

Federal Sentencing Guidelines § 2S1.3(b)(2) (lower base offense level if "defendant did not act with reckless disregard of the source of the funds").

21 U.S.C. § 321(bb) ("knowingly" includes "acts in deliberate ignorance or reckless disregard of the truth or falsity of the information").

21 U.S.C. § 842(a)(11) (imposing criminal penalties on persons who provide certain laboratory supplies "with reckless disregard for the illegal uses to which such a laboratory supply will be put").

31 U.S.C. § 3729(b)(3) (persons who present false claims for payment knowingly or "in reckless disregard of the truth or falsity of the information" are liable for civil penalties).

31 U.S.C. § 3801(a)(5)(C) (persons presenting false claims "in reckless disregard of the truth or falsity of the claim or statement," are liable for civil penalties).

31 U.S.C. § 3803(c)(2)(B)(iii)(III) (persons seeking benefits who act "in reckless disregard of the truth or falsity of the claim or statement" are subject to civil penalties).

42 U.S.C. § 1320a-7a(i)(7)(B) (the term "should know" means that a person with respect to information "acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent is required").

42 U.S.C. § 1437z-1(h)(2) (defining "knowing" to mean "having actual knowledge of or acting with deliberate ignorance of or reckless disregard for the prohibitions under this section").

42 U.S.C. § 3537a(e)(4) (defining "knowing" to mean "having actual knowledge of or acting with deliberate ignorance of or reckless disregard for the prohibitions under this section").

42 U.S.C. § 3545 (m)(5) (defining "knowing" to mean "having actual knowledge of or acting with deliberate ignorance of or reckless disregard for the prohibitions under this section").

49 U.S.C. § 46505(c) (increased penalty for violations of section "with reckless disregard for the safety of human life").

49 U.S.C. § 46507(1) (imposing criminal penalties for giving false information "with reckless disregard for the safety of human life").

APPENDIX C

FEDERAL STATUTES USING THE TERM "INDIFFERENCE"

15 U.S.C. § 2205 (administrator authorized to take steps to "overcome public indifference as to fire and fire prevention").

16 U.S.C. § 5401(7) (program authorized to redress "the adverse consequences of a period of indifference").

18 U.S.C. § 831(b)(1)(B)(i) (authorized increased term of imprisonment for violations "manifesting extreme indifference to the life of an individual").

18 U.S.C. § 1365(a) (imposing criminal penalties on certain persons guilty of tampering with consumer products "under circumstances manifesting extreme indifference to" risk of death or bodily injury).

18 U.S.C. § 1864(a)(3) (imposing criminal penalties on persons suing a hazardous device on federal lands "under circumstances manifesting extreme indifference to" risk of death or bodily injury).

Sentencing Guidelines § 2Q1.6(a)(3) (higher base offense level for certain actions "under circumstances manifesting extreme indifference to" risk of death or serious bodily injury).

30 U.S.C. § 1291(29) ("unwarranted failure to comply" with a permit "means the failure of a permittee to prevent the occurrence of any violation of his permit . . . due to indifference, lack of diligence, or lack of reasonable care").

42 U.S.C. § 14503(a)(3) (immunity for certain volunteers not available if they acted with "flagrant indifference to the rights or safety of the individual harmed by the volunteer").

49 U.S.C. § 28103(a)(1) (punitive damages may be awarded against rail passenger carrier only on proof of a "conscious, flagrant indifference to the rights or safety of others").